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THE JURISPRUDENCE OF THE WORKMEN'S COMPENSATION LAWS.

I. INTRODUCTORY.

In the public discussions, literature and judicial decisions in this country relating to the subjects of workmen's compensation and social insurance it is often charged, asserted or implied that the compensation laws of Europe rest solely upon economic and sociological bases. And the inattention to juridical principles that has characterized the formulation of many of our American compensation laws, has tended to confirm this error. Consequently there is need of a presentation here of some exposition of the jurisprudence of those European laws. The task is rendered difficult by the differences in form assumed by those laws and by the multitude of variations in their minor details. To reduce the confusion from this cause, attention will be confined to the laws of France, Great Britain, Germany and Austria, both because of the relative industrial importance of those countries and because their laws present the four principal types of the compensation law.

In historical order the German compensation law comes first. But for the purpose of this study it will be more enlightening to take up first and in greatest detail the evolution of the law in France, for the reason that, whereas in the other countries the

change to the compensation law was comparatively sudden and little discussed, in France it took place only after nearly twenty years of parliamentary debates and popular discussion, in the course of which the newer theories of responsibility and the principles and motives of the new law were most completely developed and most clearly presented.

The line of discussion in the following pages starts with the objections to the former law of employer's liability, passes first to the various juridical theories of responsibility proposed as the basis for a substitute, next to an analysis of the principles of the four compensation laws selected as typical, then to the economic and sociological theories more or less associated with those laws, and finally concludes with the principal objections to them. Early in the discussion will be presented the principles of the juridical theory of responsibility for "trade risk"; and thereafter the points for consideration will be how far those principles really underlie the compensation laws and how far they are sound and expedient.

In an attempt to avoid prolixity main principles have been emphasized and minor details and variations ignored, to an extent that may appear excessive. Access to some primary sources of information, upon which the writer was depending to complete the study of this subject, was shut off by the sudden outbreak of the war. This fact must serve as an excuse for some obvious imperfections and possible errors.¹

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II. THE LAW OF EMPLOYERS' LIABILITY EX DELICTO.

In all the four countries to which attention will be confined, what for convenience may be called the old law of employers' liability for accidents to employees was approximately identical, being based upon the principle of responsibility solely *ex delicto*. In Germany, generally, and in Austria the employer was liable only for his personal faults, including negligence in the selection of his employees.² In France and the Rhenish States of Germany the employer was liable for his own personal faults and for those of certain agents and agencies.³ In Great Britain he was liable for his own personal faults, and, under the principle of *respondeat superior*, for those of his employees, but subject to the defences of assumption of risks, common employment and contributory negligence.⁴ In all of these countries the burden of proof was upon the injured employee, and the measure of liability was full damages.

This body of law was the outgrowth of the application to the relation of employer and employee of the principles of the Roman Law applicable between strangers. Because its principles are thus ancient it is a common impression that the law in this specific application is likewise of long use. The contrary is the fact. During Roman times and the Middle Ages the question of occupational accidents did not arise.⁵ The relations between masters and workmen were then generally governed by a law of *status*, and there was seldom any labor contract, in the modern

pensation for Industrial Accidents", New York, 1910; "A Second Brief" on same, New York, 1912.

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² Report, Commissioner of Labor, p. 983.

³ French Civil Code, Arts. 1382-6; Sagot, p. 242.

⁴ Ruegg, Chap. I.

⁵ Bouyer, pp. 16-17.

sense of the term. It is sufficient to note without going into this complex and historically obscure subject further, that until very recent dates, indeed, generally, until well into the Nineteenth Century, there were no "damage cases" between employers and employees. Such cases arose only after a change had taken place in the relations of employment, due principally to the development of modern forms of industry. Consequently, from the practical standpoint, this branch of law is a very modern experiment, entirely out of harmony with the practices of the many centuries that preceded its use.

In the first stage of the experiment the tribunals applied the principles of this law with rigorous logic, requiring real personal fault on the part of the employer, really proved, as a condition to the right of indemnity.⁶ The social results were deplorable. On the one hand was the waste, delay and uncertainty of the remedy and the pernicious hostility it developed between the parties to the labor contract. On the other hand was the ever growing army of destitute victims of industrial accidents that it dumped upon their helpless families and the public for support and charitable relief. But the wrong was not all social. The results soon came to be recognized to be unjust as between master and man.

Consequently there succeeded a disposition on the part of courts and legislatures to stretch the law to favor the workmen, regardless of the logical consequences of its principles, while ostensibly still adhering to those principles. The rules of proof were relaxed, fictitious faults were presumed, faults of others were imputed to employers, a relation of cause and effect between the damage suffered and the fault alleged was blindly inferred, and indefinite and impossible duties were imposed upon or attributed to employers for the sole purpose of creating of their unavoidable non-compliance a novel category of factitious faults to serve as a basis of liability.⁷ "It is by humane fictions that the tribunals manage ingeniously to discover faults, or rather to invent them, where there are none, just in order to give the victims the right to indemnity."⁸

⁶ Sagot, p. 15.

⁷ Cf. Sagot, p. 15 *et seq.*

⁸ Cheysson, cit. Serre, p. 8.

This process had not proceeded far—in Great Britain it had hardly started—before it was perceived by jurists that in its operations the law was recklessly departing from its principles,⁹ and that to keep within the limits of jurisprudence, it was necessary either to return to an honest application of those principles or to discover some new principle upon which to base a more extensive liability.

On the practical side also the results of this process were recognized to be for the worse. The uncertainty and delay of the relief were as great as ever, the economic waste and consequently the burden upon industry was multiplied, employers were exasperated by the falseness of the charges upon which they were being punished, and yet the gain in relief to the workmen in the aggregate was slight. Their chances in the gamble of litigation were substantially increased, but they were still left to bear all the loss from far the greater part of the mass of accidents.

In Great Britain there grew up an insistent demand for an enlargement of the right to indemnity by abrogating the employers' defences, due to the fact that "the increase in the magnitude of private business undertakings, where the employer took but small share in the actual management, and the establishment of numerous companies with limited liability, where the employer was merely an abstract personality, rendered the retention of the doctrine of common employment a matter of great hardship to the workmen."¹⁰ But compliance with this demand would have left fault still to be proved, and consequently would not have much improved the position of the workmen, since the largest category of accidents are not due to faults; and, on the other hand, the justice of applying the principle of *respondeat superior* to practically all wrongs committed by employees against one another in the course of their work was too generally denied to be admissible.

Consequently it came to be appreciated in all four countries that the theory of employers' responsibility solely *ex delicto* was wrong.¹¹ Legislatures and tribunals were empirically discarding it piecemeal; and the public conscience was in revolt against its

⁹ Morin, p. 10.

¹⁰ Ruegg, p. 37.

¹¹ Cf. Bouyer, pp. 127-8.

practical results. The selection of some other and broader theory of responsibility was, therefore, in order.

But this law was subjected to other criticisms besides that of its insufficiency, three of which are sufficiently relevant to be noticed.

1. Intimately associated with the English law of liability solely *ex delicto* is the doctrine of assumption of risks. This doctrine is that in accepting employment the workman should be presumed to have contracted to assume, first, all the ordinary and usual risks incidental thereto, and, secondly, all risks which he knows, or in the exercise of reasonable care may know to exist. The second branch of this doctrine supports the defence of common employment, whereas the first, as it were, confirms the justice of the theory of responsibility only for fault. The premises upon which this doctrine is based are that the workman is free to accept or reject employment, and that wages are fixed proportionately to the risk, so as to compensate for extraordinary dangers. These premises are now known to be false;¹² and consequently the doctrine in question is generally recognized to be unsound.¹³ So long as the principle of no liability without fault prevailed, the collapse of this doctrine held out no prospect of much improving the position of the workmen, since the necessity of proving some kind of fault would still remain. But when that principle came to be regarded as unconscionable in application to the relation of employer and employee, then the rejection of the doctrine that the workman may justly be presumed to have contracted to assume the usual and ordinary risks of his employment naturally led to the question, whether some other and more equitable contract as to those risks might not justly be presumed or imputed. This question is answered by the doctrine of "trade risk," which, as will be shown later, imputes a contract for an equitable division of those risks.

2. In theory at least the law of liability *ex delicto* uses the *proximate* cause as the criterion of responsibility. But the cause of an accident is the sum of the antecedent conditions that have led up to its occurrence, and the selection among such conditions

¹² Sagot, pp. 103-4; Bouyer, note pp. 151-2.

¹³ Ruegg, p. 16.

of the proximate condition is almost purely arbitrary.¹⁴ Industrial experience teaches that to adjudge responsibility for industrial accidents according to the proximate cause alone is unjust as well as dangerous. Consequently the application of this criterion cannot be uniformly just. Greater justice would be effected by predicating *partial* liability upon responsibility for any cause materially contributing to the occurrence. The relevancy of this conclusion will appear later, when we see that the compensation laws base the employer's liability for partial reparation upon his responsibility for any risk in the chain of causation, not too remote to be material.

3. In practice the law of liability *ex delicto* so frequently miscarries as to result in an utter travesty of justice according to any theory.¹⁵ The principal cause thereof is that in application to accidents occurring under the complex conditions of modern industries, fault is a most radically unfit criterion of liability for practical use: (a) Because "fault" is a term of most uncertain and indefinite meaning when applied to concrete cases. (b) Because the question of fault is peculiarly liable to incorrect decision, through sympathy, prejudice or ignorance. (c) Because in a large proportion of cases the facts upon which to predicate a correct judgment are practically unascertainable.¹⁶ (d) Because in a yet larger proportion of cases they are unascertainable by judicial process.¹⁷ (e) Because the expense and delay unavoidably incident to a determination by judicial process are so great as indirectly to defeat justice in a majority of cases. Consequently, under some conditions at least, fault, as the sole criterion of liability, must be rejected as an ineffective means for an impracticable end.

¹⁴ Cf. Howe's "Studies in the Civil Law", 2d ed., pp. 295-7.

¹⁵ Everywhere it is noticed that judges and active members of the legal profession are the last to appreciate this phenomenon. Shut off from direct observation of the physical facts, they are the slowest to realize the general and radical disaccord between the judgments of the courts and the facts and the merits of the cases decided.

¹⁶ Serre, p. 73.

¹⁷ *Id.*, p. 3.

III. THE NOVEL THEORIES OF RESPONSIBILITY.

General dissatisfaction with the theory and results of the law we have just discussed led to a search for some new theory upon which to base a more satisfactory law of employers' liability. In this chapter the principal theories proposed for that purpose will be presented and discussed.

Theory of Contractual Responsibility.

Because between employer and employee there is a contractual relationship, the law governing responsibility for accidents that occur during that relationship should be differentiated from the law governing responsibility for accidents between strangers.¹⁸

The theory of contractual responsibility starts with the contract of employment. That contract, it is argued, creates rights in favor of and obligations upon the employer and employee respectively. Being a contract of good faith it includes not only what is expressly agreed to, but also everything that equity, custom or the law implies from its nature. Under all contracts, besides the principal obligation, there arise incidental or secondary obligations, assuring its faithful execution. One of such natural consequences of the labor contract is to bind the employer to take all precautions indispensable to the security of the workman.¹⁹

According to the measure of responsibility ascribed to the employer, this general theory takes three specific forms:²⁰

1. The theory of absolute guarantee. "The employer is bound to look out for the safety of the workman; that is, he is bound to preserve the workman safe and sound during the course of the dangerous work confided to him. The employer must always be able to discharge the workman to himself as sound as when received, just as the bailee of a thing must return it intact to the bailor at the end of the bailment."²¹

¹⁸ Sagot, p. 30.

¹⁹ Bouyer, pp. 66-7.

²⁰ Bouyer, p. 67.

²¹ Sauzet, cit. Bouyer, pp. 69-70.

The fatal objection to this theory is that it takes no account of the workman's mastery over his own acts, which, to judge from statistics, are the element responsible for at least twenty-five *per cent.* of all occupational accidents. Is it admissible to presume a contract, between free men, which ignores such an important circumstance.²²

2. The theory of the duty of vigilance. "The employer in the organization of the work he directs is bound to take all necessary precautions, within the limits of possibility, against the dangers inherent in the work. This surveillance should be more active in a dangerous industry and over young and inexperienced persons. The measure of the vigilance required of the employer, therefore, varies according to circumstances."²³

The practical purpose of this theory is to justify a reversal of the burden of proof. And it is contended by its advocates that such is its logical consequence. The employer, it is argued, owing his employee a guarantee of all necessary precautions, where the latter is injured in the course of the employment, the employer is presumed not to have fulfilled his obligation, but is presumptively at fault. Consequently in order to recover damages the workman need not prove his employer's fault, but the burden of proof is on the latter to show that he has fulfilled his obligation and that the accident is not imputable to him. The practical result of this consequence is that in doubtful cases or where proof is impossible or difficult, the employer is liable, whereas under the theory of responsibility solely *ex delicto* the injured employees would suffer the loss.²⁴

This theory has been overwhelmed by criticisms, of which it is sufficient to note the following: If by the labor contract the employer may justly be held to have contracted to take all possible precautions to guarantee the safety of his employee, then the latter also must be held to have contracted to observe rules and discipline and to exercise due care. Why then, in case of injury, presume the fault of the employer rather than that of the

²² Ancey, p. 15.

²³ Planiol, cit. Bouyer, pp. 71-2.

²⁴ Morin, p. 12.

employee?²⁵ Or, even eliminating the idea that the workman should be deemed to have contracted to observe rules and discipline, *etc.*, yet the practical consequence claimed, the shifting of the burden of proof, does not logically follow. "The accident does not suffice to prove that all the precautions necessary . . . have not been taken by the employer, for in case of doubt and *a priori*, there is no reason to attribute it to his fault rather than to *force majeure* or the imprudence of the workman."²⁶

3. The theory of responsibility for "vices." "By virtue of the general principles governing the contract of hiring, . . . each of the contractants is responsible for the *vices* that may be found in the things that he confides to or in the places where he installs the other party, in the execution of the contract. He is responsible for the damage caused by such vices, even though he has had no knowledge of them at the time of the contract. . . . These principles, admittedly applicable to the hiring of things, apply equally to the hiring of labor or industry, for they arise from the very nature of the contract. No reason can be found for a distinction."²⁷

The purpose of this theory is the same as that of the preceding theory, *i. e.*, to justify a reversal of the burden of proof. It is subject to the same objections.

The first form of this theory was enunciated by the French jurist, Sauzet, in 1883 and by the Belgian Saintellette in 1884. Reduced to the second form it gained some favor in the Belgian courts. And some sort of a theory of contractual responsibility was the basis for the German law of 1871, the Swiss law of 1877, and the bill introduced in the French Chamber of Deputies, May, 1880, by Martin Nadaud.²⁸

Theory of Responsibility for Things Under One's Care.

So far all theories noticed have based the employer's responsibility upon the idea of fault—actual, presumed or imputed

²⁵ Sagot, p. 47.

²⁶ Bouyer, p. 79.

²⁷ Esmein, cit. Bouyer, pp. 75-6.

²⁸ Ancy, p. 14; Bouyer, pp. 68, 73.

But there is another juridical basis for such responsibility—the obligation to bear a risk. This obligation may fall upon the employer, either because he has under his care things that cause damage, or because he is the master of an enterprise that creates risks. Hence two theories of responsibility without fault—the theory of responsibility for things under one's care, and the theory of trade risk.²⁹

The former theory, "*theorie du fait des choses*," is presented in the following excerpts and paraphrases:

One is responsible not only for the damage caused by one's faults, but also for that caused by things which one has under one's care.

"Where an injury is truly caused by our property, we are always and necessarily bound to repair it, even though no one can reproach us with any illicit act or culpable omission. For our responsibility has its source, not in a contractual or delictual fault, but in the law itself. The claimant of damages, then, need prove only one fact; namely, the connection of cause and effect between our property and the prejudice suffered. This is an objective theory substituted for a subjective theory."³⁰

According to this objective theory, the responsibility resting upon the owner (the employer being considered as the owner, or, better, as the guardian), has nothing to do with contract or tort; it springs directly from the law. "Its basis is not a presumption of fault, but a legal obligation to bear a risk. The damage caused by an object should be borne by its owner, that is, by him who profits from it, all idea of fault being put aside. Responsibility ceases to have its basis in the fault of the owner, that is, in subjective fault. Simply the injury caused by the thing, or rather the act of the thing, called the objective fault, suffices to create the responsibility."³¹

"The idea of fault has not truly been altogether eliminated; on the contrary it subsists, but transformed. It is no

²⁹ Bouyer, pp. 6, 100.

³⁰ Josserand, cit. Bouyer, p. 110.

³¹ Bouyer, p. 117.

longer personal fault, relating to the accident, that the law looks for, but an exterior fault implied from the facts."³²

"The persons responsible, under this objective theory are, properly speaking, not the owners of the things that have caused the damage, but their guardians, that is, 'those who have them under their care—those who use them.'" As between an employer and an employee, it is the employer, "who, in the juridical and social sense, has the care of the machine. Consequently the risks from the thing are for the employer, considered as guardian rather than as owner."³³

In general this theory applies to all *things*, animate and inanimate, that are susceptible of appropriation and are under one's care.³⁴ In order to be entitled to indemnity the workman has to establish a connection of causality, no longer between the accident and a fault of his employer, but simply between the accident and a thing of his employer's. That connection is the sole but a necessary condition to responsibility.³⁵ But the responsibility does not arise unless the accident is fully caused by the thing. Consequently the thing must be not only the *material* but also the *original* cause—it must be the *efficient* and not only the *occasional* cause. Consequently the objective criterion of responsibility prescribed by this theory is far from being so simple and easily determinable as appears at first impression.³⁶ Injuries due to *force majeure*, to acts or things of third parties, to the injured persons' own faults, or to dangerous *conditions* of employment are not covered.³⁷ The responsibility of the employer for damage caused by his thing is for "reparation," not "damages." It should be disassociated from all idea of punishment, as if for wrong.³⁸ It is appropriate, therefore, that the indemnity should be fixed and limited by the law.

³² Bouyer, p. 94.

³³ *Id.*, pp. 128-9.

³⁴ *Id.*, p. 130.

³⁵ Morin, pp. 16-17.

³⁶ Morin, p. 21; Bouyer, pp. 132, 141.

³⁷ Morin, p. 21; Bouyer, p. 132.

³⁸ Bouyer, p. 11.

This theory was vaguely enunciated as early as 1871.^{38a} In the late nineties it was obscured by the efforts of the jurists Saleilles and Josserand to base it upon a novel interpretation of Articles 1384 and 1386 of the French Civil Code.³⁹ But in the course of discussions it has been advanced again and again in a pure form, and, especially in limited application to extra dangerous things, it is widely accepted and has exerted considerable influence upon all liability laws.⁴⁰

Nevertheless this theory, although possibly sound as far as it goes, will not suffice. Its criterion of responsibility is too abstract to be exact and practical, and too simple to be comprehensive. It necessitates a precarious search for the original or efficient cause before responsibility can be determined. And it omits from the scope of the employer's responsibility accidents due to causes, such as dangerous conditions, for which he may be just as much responsible as he is for his material things.⁴¹

Theory of Trade Risk.

This theory, better known by its French title of *risque professionnel*, is said to have been in the air throughout Europe at an earlier date, but seems to have been presented for the first time in an applied form in the bill introduced by Felix Faure in the French Chamber of Deputies, February 11, 1882.

To summarize its principles in a few words:⁴² Every initiative entails risks. One is responsible when one acts and in proportion to one's acts.⁴³ The initiative of the employer is primary. His activity predominates in industry. Therefore he is responsible for a greater part of the trade risk. But the employee also acts through a free choice of occupation and a voluntary acceptance of the conditions of his employment, and to some extent remains master of his own acts. He, therefore, is responsible

^{38a} Bouyer, pp. 113-114.

³⁹ Bouyer, pp. 118, 134-140.

⁴⁰ Cf. *St. L. & S. F. R'y v. Mathews*, 165 U. S. 1 (1897) at p. 9; *Hart v. West. R. R. Co.*, 13 Metc. 99 (Mass. 1848) at pp. 103-4; and *Rylands v. Fletcher*, L. R. 1 Exch. 282 (1866).

⁴¹ Morin, pp. 23-4; Bouyer, pp. 141-2.

⁴² Ancy, p. 16.

⁴³ Cf. Holmes, "The Common Law".

for a substantial part of the trade risk. There is, therefore, ground for a division of the risk.

The division of the risk must be fixed by the contract of employment. But, lest the workman should be forced to contract to assume all the risks, if left to make the contract for himself, public policy requires that the law should fix the division and impute a contract accordingly.⁴⁴

This theory involves the abandonment of the search for responsibility, in the traditional sense of that word. For it distinguishes the idea of responsibility from the idea of fault, and establishes a line of responsibility for causation, without fault.⁴⁵

This is a novel conception. The idea of risk is substituted for the idea of fault. Where a person exercises an activity, employing others to the extent of making them his passive instruments, he is responsible for the consequences of his initiative and particularly for the risks incurred by those who serve him.⁴⁶

According to this theory the idea of fault is a false point of departure, that should be avoided. The majority of accidents, in extra-hazardous occupations at least, are not imputable to the faults either of employers or of the injured employees, but are the results of the more or less dangerous nature either of the work or of the means and conditions. Therefore it is altogether wrong to search ingeniously for faults or to presume or impute or invent them in order to establish responsibility.⁴⁷

"This theory of *risque professionnel* is only a particular and special application of the general principle, that: 'He ought to bear the consequences who has directed the damage producing force and occasioned the injury suffered by creating a risk for his own interest.' '*Periculum ejus esse debet, cujus commodum est.*'"⁴⁸

The liability for damages *ex delicto* is in the nature of a penalty, whereas the liability under this theory is not to be consid-

⁴⁴ Ancey, pp. 17. 27.

⁴⁵ Ancey, p. 15.

⁴⁶ Sagot, p. 64.

⁴⁷ Sagot, pp. 146-7.

⁴⁸ Bouyer, pp. 148-9.

ered in any degree as a penalty but simply as an equitable reparation for damage done.⁴⁹ The trade risk is the risk incidental to a given trade, occupation or task, independent of the faults of the employer or employee.⁵⁰ It is approximately identical with those usual and ordinary risks, which, under the English Common Law, the servant was deemed to have assumed, risks caused by faults of co-employees and third parties included. Simply by reason of his occupation, in the majority of industries, the workman is exposed to inevitable chances of accident, from which he cannot protect himself and which, the employer, whatever be his vigilance, cannot prevent.⁵¹ These constitute the trade risk in its very strictest sense.

Given these risks ought their consequences be borne by him who draws only wages or by him who enjoys the chance of profit, or should they be divided? "To answer this delicate question we have recourse to a principle of common sense and social equity. The inevitable damages entailed by an enterprise should be borne by and distributed among those who profit from the enterprise. Participation in the profits calls for a proportionate contribution to the losses: '*Ubi emolumentum, ibi et onus.*' This principle shows upon whom should fall the charge of the trade risk—namely, the industry."⁵²

The danger being inherent in the industry it is just that the industry should bear the loss therefrom. "It is the industry rather than the employer that is responsible. That is the fundamental idea of this new theory. The employer is held liable, not as being culpable nor even as being strictly responsible in the older sense of that word, but as the appropriate economic distributor of all the charges that enter into his expense of production."⁵³

"The sum of the indemnities enters into the cost of the enterprise by the same right as the expense of repairing machin-

⁴⁹ Bouyer, p. 11.

⁵⁰ Sagot, p. 49.

⁵¹ Bouyer, p. 146.

⁵² Bouyer, p. 150.

⁵³ Faure, cit. Sagot, p. 50.

ery. It ought, therefore, to be taken into account in calculating the price of the product."⁵⁴

"But what is the industry? From the economic point of view, the industry consists of the union of two factors—capital and labor. . . . Associated in the work of production, the employer and his workmen should each bear a part in the risk."⁵⁵

A later variation of the theory is here to be noted: The foregoing system, "at first sight so equitable, is not altogether satisfying. . . . These two factors, the employer and his employee are united rather than associated. One is subordinated to the other. One obeys the direction and orders of the other. Practically, then, the industry is personified in the employer, who creates the plant, maintains it, exploits it as he wishes, and alone draws profits from it. Therefore it is for the employer to respond for the injurious consequences of the risks of the industry."⁵⁶ This idea has been frequently advanced as an argument in support of the proposition that upon the employer alone should fall the charge for the "compensation", that is of the partial reparation to be paid to the injured workman; but it also appears to have been often advanced, as in the foregoing excerpt, as the basis for the measure of responsibility. For the latter purpose it suffers from not being in conformity with facts, both in exaggerating the subordination of the workman and in ignoring his share in the profits of industry through wages.

The liability in question, having its basis in the contract of employment, covers only the economic loss from an injury to the person caused by the trade risk; and the remuneration under that

⁵⁴ Cheysson, cit. Sagot, p. 50.

⁵⁵ Bouyer, p. 150. The same idea, approached from a different angle, is thus expressed by Professor Ernst Freund, discussing the constitutionality of the compensation principle under our American constitutions: "Can the legislature say to the employer: 'If for the purpose of your business you provide and require the use of dangerous appliances which are humanly speaking certain to result in accidents, you shall not let the consequences of the accidents lie where they fall, but assume your share of them?' The principle of making a common peril of a common venture is not unknown to our jurisprudence; in another form and application it is not unlike the principle which, under the name of general average, is familiar to the maritime law of all nations. If the Common Law has not developed such a principle this simply proves that the Common Law is not the last word of all wisdom and justice." ("The Survey", April 29, 1911.)

⁵⁶ Bouyer, p. 151; cf. Sachet, p. 11.

contract is the general basis for the measure of the loss.⁵⁷ Accidents not caused by a risk of the particular occupation or which are caused solely by *force majeure* or by a fault of the employer or of the injured workman are not covered. This is the pure theory. For practical reasons the laws based upon this theory are all given a wider scope.

Associated with the theory of trade risk is a more moral conception of "fault" than that which has grown up under the law of liability *ex delicto*. Under this conception all presumed, imputed and other fictitious faults disappear, and mere occasional acts of imprudence or inadvertence, such as are inevitable at times to all human beings, are deemed to belong in a different category from torts.⁵⁸ How far this contraction of the idea of fault should be pushed remains a subject of differences of opinion. But even in its most restricted extension this conception greatly enlarges the sphere of the trade risk and contracts the proportion of accidents to be ascribed to faults.

The theory of trade risk has been here presented in its purest abstract form, in order to make clear its juridical nature. In a later chapter it will be shown that the compensation laws selected for consideration are distinctly based upon this theory.

Theory of Responsibility for Existence.

Contemporaneously with and opposed to all the theories hereinbefore discussed has existed a Socialist doctrine, which, of late years, has been propounded also as a juridical theory of responsibility.

According to that theory: "The theory of trade risk, which holds the employer responsible for the risks he has created, is a theory imagined by jurists in order to bring within the domain of jurisprudence a novel economic and social conception of the obligations of employers towards employees."⁵⁹

The difficulties and uncertainties incident to the application of that theory, as developed in practical experience under

⁵⁷ Bouyer, pp. 11-13.

⁵⁸ Bouyer, p. 162.

⁵⁹ Morin, p. 93.

the compensation laws, demonstrate its inaptitude and that a simpler theory is needed.⁶⁰

Moreover the idea at the basis of the whole movement of public opinion which led up to the workmen's compensation law in France and other countries was not the juridical and subtle idea of trade risk. It was "a far simpler social idea, in circulation long before there was any notion of 'trade risk', namely, the idea that the workman ought to be guaranteed against the uncertainties of the future, that he ought to be protected against the risks that threaten him, in a word that he has a 'right to existence', and that his labor should insure him that right."⁶¹

Wages should not be considered simply as compensation to cover so many hours of labor; for they are the sole resource of the laborer. "Consequently they should suffice for his support while idle as well as while at work, and should provide for him during infancy and old age as well as during full manhood, during sickness as well as during health, and during days of necessary idleness as well as during days of labor."⁶²

Consequently the employer owes his employee not only a living wage from day to day, but also assurance against any loss of that wage through misfortune. "It is the workman's right to existence that constitutes the basis of his employer's responsibility. This responsibility has its source in the person of the workman and not in that of the employer. Consequently the employer is responsible for accidents as to which he is in every sense a stranger."⁶³ He is responsible for every accident happening to his employee, whensoever or wheresoever it may occur and whatsoever may be its cause.⁶⁴ Being responsible for his employee's existence, the employer's liability is not limited by the wage loss, should the "needs" of the workman and his family exceed that sum.

This radical theory is presented simply to distinguish it from the political theory of State-socialism, which underlies the social

⁶⁰ Morin, pp. 83-90.

⁶¹ Jay, cit. Morin, pp. 93-4, and Bouyer, p. 148.

⁶² Sismondi, cit. Morin, p. 94.

⁶³ Morin, p. 95.

⁶⁴ Morin, pp. 97-8.

insurance systems of Germany and Austria. Briefly that latter theory is that the *state* owes to its industrious working-people not only the protection of its laws but also a reasonable guarantee of the material necessities of life. Accordingly the state taxes workmen, employers and the public generally to maintain insurance for the workmen against their most common misfortunes. Under such social insurance systems, however, the accident insurance is put on a different basis from the other lines of insurance, being assimilated to the compensation law and based upon the theory of trade risk, as will be hereinafter more fully explained.^{64a}

IV. THE PRINCIPLES OF THE COMPENSATION LAWS.

Having now reviewed the principal juridical theories of responsibility, it remains to be shown that the compensation laws are based upon one of them, namely, upon the theory of trade risk. For that purpose will be presented in this chapter a brief outline of the genesis of each of the four laws selected for consideration, and an analysis of its most important provisions, sufficient only to make clear its principles.

The French Law.

The problem that presented itself to the French legislators in the early eighties of the last century was intensely practical. Indeed the then existing law of employer's liability, based upon the theory of responsibility solely *ex delicto*, was generally condemned, not so much because of its theory, for few outside of the legal profession comprehended that theory, but because its practical results offended the popular sense of justice.

The results demanded by the public conscience, judging from various records, may be roughly summarized in the following items: A recognition of the right of the workmen to an indemnity in the largest proportion of cases reasonably possible; a fixed rate of indemnity, mutually equitable and at the same time sufficient for relief; the reduction of litigation, and for that purpose elimination, generally, of the vague and trouble-breeding issue

^{64a} *Infra*, pp. 859, 865-6.

of "fault"; and some assurance of the payment of the indemnity, not too burdensome to industry.⁶⁵

That, in response to such demands, a law of private rights and obligations, should be shaped, in some of its features, with a view also to satisfying public utility, was too well supported by precedents to occasion much comment. But it was objected that the proposed law went further, and that what it would establish was simply a system devised *a posteriori* to accomplish certain social results.⁶⁶ But this objection was ultimately abandoned by all except a few irreconcilables.

The question of amending the principles of the law of employer's liability first received the attention of the French National Assembly in 1880 when, on May 29, M. Nadaud introduced a bill providing for the reversal of the burden of proof. Other bills on the general subject were introduced from 1881 to 1883, among them being a bill by Felix Faure, based upon the theory of trade risk, which provided for the payment of indemnities through an insurance institution, and a bill by Count de Mun, based upon the same theory, but providing for the insurance of indemnities in mutual associations to which employees should contribute.⁶⁷ These measures were the subjects of many discussions and reports. They all culminated in a bill drawn by a parliamentary commission, which was adopted by the Chamber of Deputies October 4, 1884, but which failed to pass the Senate. The Government then instituted an extra-parliamentary commission, which formulated a proposition that served as a basis for bills introduced December 29, 1885, and February 2, 1886. Other bills emanating from members of the National Assembly were introduced in 1885, 1886, 1887, 1888, 1890, 1891, 1893 and 1895, notable among which was the bill of June 26, 1886, by Felix Faure, definitely to establish trade risk as the juridical basis of a direct legal liability. All of these bills were more or less lengthily discussed; but all failed.⁶⁸

⁶⁵ Cf. Bellom, cit. Bouyer, p. 146.

⁶⁶ Villeroux, cit. Bouyer, note pp. 173-4.

⁶⁷ Serre, pp. 251-2.

⁶⁸ Sagot, pp. 78-178; Report, Commissioner of Labor, pp. 681-3.

By this time the theory of trade risk seems to have won the field. But the parliamentary struggle still continued with unabated vigor over various subsidiary questions. And it was only after nearly twenty years of agitation, struggles and debates, that the final bill was introduced in the Senate February 14, 1898, and adopted March 19, 1898. The Chamber of Deputies then adopted it, March 26, 1898. It became a law April 9, 1898, going into operation July 1, 1899.

Reviewing the debates and the measure finally adopted:

By general agreement wilful wrongs were excluded from the application of the proposed law; but slight faults gave rise to some controversy, and serious faults remained long a subject of disagreement.

On the one hand, it was insisted that slight faults belong in an entirely different category from wrongs, and that it would be better to assimilate them to the trade risk and to treat alike all accidents resulting from either of these causes.

On the other hand, there were those who "wished to establish categories of accidents, contending that those due to pure fortuity or *force majeure* alone ought to be classed under the trade risk, that in other cases the employer and workman respectively should each be held responsible for his personal faults, that such is the spirit of the civil law, and that it is necessary to maintain this distinction, under penalty of enfeebling the just and salutary principle of responsibility."⁶⁹

In response it was argued that in practical application this attractive theory for maintaining the sense of personal responsibility would be a source of perpetual disputes, since every victim would have an interest to show that the accident was due to the fault of the employer, and *vice versa*; and, consequently, that it would give rise to incessant litigation, involving a return to all the uncertainty, contradictions, delays and general failure of justice that characterized the old law.⁷⁰

Supporting this latter view it was argued:⁷¹

⁶⁹ Serre, p. 9.

⁷⁰ *Id.*, pp. 9-10.

⁷¹ Tolain, cit. Sagot, p. 98.

"What in fact is the exact responsibility of an employer, if, when urged on by demands for delivery on a day fixed, under penalty for delay, he presses his employees to work overtime, when fatigue makes the sight less clear and the hand less sure?"

"What is the exact responsibility of the workman who in the rush of work, obliged to follow the automatic movement of machinery, inadvertently neglects this or that minor rule or precaution?"

"What is that of the employer, who, in the rush season, believes it possible to delay for several days or even hours, some required repairs or changes, not apparently of pressing necessity, in order not to interrupt his work?"

"Is it not more simple, prudent and just, in the dangerous industries, to group all accidents due to such causes under the trade risk?"

That view prevailed.

But the question of serious faults still remained to be settled. M. Faure contended that they also should be covered, apparently as incidental to the principal liability. Others contended that to do so would be immoral and prejudicial to safety in industry. In reply the fact that the indemnity would be only partial was emphasized; and it was argued that before serious faults could be excluded they would have to be clearly differentiated from slight faults, which is impossible, because faults vary in degree as imperceptibly as the change from daylight to dark, with no point at which a reasonable and practicable line of demarcation can be drawn. Moreover, under the complex conditions of modern industry the cause of an accident is very often impossible to determine. Hence, two serious elements of uncertainty—that of cause and that of fault.

Under these circumstances, the employer having always an interest to ascribe the accident to a serious fault of the workman and the workman to ascribe it to a serious fault of the employer, the practical advantages to the parties of a fixed indemnity would be sacrificed.⁷² The final compromise on this question was to increase the indemnity for "inexcusable negligence" on the part of the employer and to reduce it for such negligence on the part

⁷² Serre, p. 17.

of the injured employee, and to include all lesser degrees of fault under the trade risk.⁷³

The determination of the occupations to which the new law should apply also presented grave difficulties.⁷⁴ Appreciation of the necessity for a change in the law of employers' liability having grown out of the transformation of industries incidental to the introduction of power machinery, the disposition of the lawmakers was to limit the application of the new law to those industries in which such machinery is used, including therein employments in connection with the manufacture or handling of explosives.⁷⁵ Those who relied upon the theory of responsibility for the care of dangerous things^{75a} sought to limit the application of the proposed law to truly extra-hazardous or "dangerous" industries or occupations.

But each and both of these grounds for a restricted application were severely attacked. The most ardent advocates of the theory of trade risk and its most bitter critics united in demanding for it the widest application.⁷⁶ The former contended that there is a trade risk in all industries and even outside of industries. If a clerk in a professional office is injured by an explosion in an adjoining factory, why, it was argued, should he be denied compensation any more than a workman employed in that factory?⁷⁷ The latter insisted that if the principle be adopted at all it should be followed to its logical conclusion. Why recognize the existence of trade risk and then refuse to recognize its consequences except in some arbitrarily selected occupations?⁷⁸

To the proposed application to dangerous industries only, it was objected that no certain line of demarcation could be drawn between such industries or employments and those wherein there is nothing to fear from accidents. The legislators could

⁷³ Serre, pp. 238-242.

⁷⁴ Sagot, p. 91 *et seq.*

⁷⁵ Sagot, p. 91.

^{75a} See *supra*, pp. 833-35.

⁷⁶ Bouyer, note p. 175.

⁷⁷ Sagot, pp. 92, 106, 143.

⁷⁸ Bouyer, pp. 174-5.

not draw a reasonable line themselves nor could they properly avoid the difficulty by leaving it to administrative officials to solve.⁷⁹

To an attempt to simplify the problem of defining dangerous industries by identifying them with those industries that use modern machinery, *etc.*, it was objected that the adoption of modern methods in industry has had the effect not of increasing the risks but of diminishing them. It is the more ancient forms of industry, with carting at the head, that are the most dangerous, whereas the textile industry, with its masses of power machinery, is at the other end of the scale. Of all motors the horse is the most dangerous.⁸⁰

In strict logic these arguments were almost convincing. But the legislators preferred to consider the matter from the practical standpoint. From that standpoint the experimental nature of the new legislation had to be considered. It was advisable to be prudent, to test the new remedy first in a limited application, and later perhaps to extend it, according to results.⁸¹

The practical conditions were that from "grand industry" particularly, from the employers as well as from the employees therein, came the demand for relief from the insufficiency, uncertainties, expensive litigation and class warfare of the old law.⁸² It was in "grand industry" that the consequences of the risks were most distressing and that the proportion of wage earners was the highest. And there, also, insurance, generally a necessary incident for the protection of the employer under the new liability, had already become usual, whereas in other employments it was almost unknown.⁸³

Moreover it was felt that there was really some distinction in principle. The need for the new remedy resulted from the changed conditions in the more modern forms of industry.⁸⁴ In the first place, the relations between the employer and employee

⁷⁹ Serre, p. 15; Sagot, p. 105.

⁸⁰ Serre, p. 15; Sagot, p. 163; *contra*, Bouyer, p. 30.

⁸¹ Sagot, p. 93; Bouyer, pp. 175-6.

⁸² Serre, p. 12.

⁸³ Bouyer, p. 176.

⁸⁴ Bouyer, p. 177.

are different—less personal and more remote. In the second place, there is a difference in the character of accidents. Under the simpler conditions of the more ancient forms of labor the causes of each accident can more often be determined and responsibility for faults correctly appraised, whereas under the more complex conditions of the more modern forms of industry that is generally impracticable.⁸⁵ In the third place, under the older forms of industry the employee is the master of his own actions and manages his own tools, whereas under the more modern forms he is himself more of a tool in his master's machine, and is thereby subjected to a novel risk.⁸⁶ From very early times there have been special laws for seamen and miners, based upon the doctrine that they are in a class by themselves, because unusually dependent for safety upon the skill and care of the one directing the work and upon the skill and care of their fellows.⁸⁷ Similar reasons seemed to justify putting "grand industry" in a class by itself. Finally, there was the influence and authority of precedents—the fact that all the compensation laws then enacted were restricted in application to the so-called "dangerous", really the "grand" or modern forms of industries.⁸⁸

The conclusion reached was to limit the application of the law to certain enumerated industries, the so-called dangerous industries, namely manufacturing, mining, quarrying, building and transportation by land or water. By subsequent amendments its scope has been extended to include employment in mercantile establishments, and in agricultural or other work where mechanical power is used.

Not all employments in the industries covered by the law are subject to it, but only those wherein the employer engages the

⁸⁵ Bouyer, pp. 26-30.

⁸⁶ Serre, pp. 8, 14.

⁸⁷ Report, Commissioner of Labor, pp. 4-5.

⁸⁸ Germany, Act of 1884; Austria, Act of 1887; Norway, Act of 1895; Finland, Act of 1895; and Great Britain, Act of 1897. These precedents were followed later by Denmark, Act of 1898; Italy, Act of 1898; Spain, Act of 1898; Sweden, Act of 1901; Belgium, Act of 1903; Switzerland, Act of 1911; and Russia, Act of 1913. The only European exceptions are, Germany, which has applied the law to agriculture; France, to mercantile occupations, and Great Britain, to all employments of service.

services of the employee for a specified task, reserving to himself the right of direction.⁸⁹ To use an expression of English law, the employment must be under a "contract of service".

The subject for reparation under the law is the economic loss resulting from an injury to the person of the workman, caused by a risk of the employment. The basis for computing such loss is the earnings of the workman, as contemplated by the parties to the contract of employment; generally, therefore, the wages or remuneration under the contract. But where concurrent contracts of employment are within the contemplation of the parties, the total wages under both contracts are the basis.

Strictly all injuries to the person resulting from a risk of the employment should be covered, whether by accident or not. Consequently in strict logic the law should apply to "professional diseases." But, for the practical reason that it is most difficult to determine the origin of such diseases, and because the methods of determination had not then been studied, it was decided temporarily to exclude them from the application of the law.⁹⁰ Since its enactment a measure providing for compensation for professional diseases has been in preparation.

In the debates previous to its enactment it was agreed that the law should provide reparation only for the consequences of the injury resulting directly from the accident, exclusive of aggravations resulting from sickness or other causes anterior or posterior to the accident.⁹¹ Subsequently, however, the courts have given the law a much different construction and effect.⁹²

As to the accidents to be covered, there was considerable difficulty in agreeing upon the exact formula to define them. That finally selected limited the application of the law to those that occur "*par le fait ou a l'occasion du travail*." Freely translated that means that the occupation of the injured workman must be either the direct or the occasional cause of the accident.

⁸⁹ Bouyer, p. 14.

⁹⁰ Sagot, p. 113.

⁹¹ Sagot, pp. 113-4.

⁹² Cf. Sachet, p. 242 *et seq.*

There must, therefore, be a causal connection between the accident and a risk incidental to the work.⁹³

In the course of the debates the idea was suggested that the rate of indemnity to be fixed by the law should at first be low and that subsequently it should be gradually raised as high as industry could stand.⁹⁴ But this suggestion was unfavorably received. What was sought for was a mutually fair rate for a division of the economic loss resulting from each accident. The quest for such a rate gave rise to two different views.

According to one idea the loss from the trade risk should be divided almost equally between the employer and the injured employee.^{94a} But in concrete form the problem was rendered more complex by the fact that the law was to cover not only accidents resulting from the trade risk, but also those resulting from certain categories of faults. Consequently in arriving at a fair average division some allowance had to be made for the relative degrees in which such faults of employers and employees respectively contribute to the aggregate loss.

There were cited various estimates of the proportions in which industrial accidents in the mass are due to employers' and employees' faults and to the trade risk respectively. Therein the trade risk was variously estimated to be the cause of from forty to seventy *per cent.* of the accidents, employers' faults of from ten to twenty *per cent.*, and workmen's faults of from twenty to forty *per cent.* Obviously these estimates varied both according to the different conceptions of fault in the minds of those who made them and according to the industries covered.

Was it then possible to fix a fair rate of division *a priori*? Yes, it was answered early in the debates (1888), not, however, by attempting to measure scientifically and exactly the respective shares of the parties in causation, for that is impossible, but by making an equitable division based upon a notion of partnership in responsibility. An enterprise is an association between the employer and his employees, which equitably entails a partnership in the risks. If then a workman loses his wages by an

⁹³ Cf. Serre, pp. 22-36.

⁹⁴ Cf. Sagot, p. 103.

^{94a} Cf. *supra*, pp. 835-836, 837-38.

occupational accident, the employer ought to share the loss—that is, he ought to pay the injured workman half of the loss, and the workman himself ought to suffer the other half.⁹⁵

From the standpoint of public policy everything was in favor of this idea. But some years later (1896) another idea was advanced. The employer ought to bear all the loss resulting from the trade risk^{95a} plus all the loss from his own faults, thus making sixty-six and two-thirds *per cent.* of the loss an approximately fair average rate at which to fix his liability.⁹⁶

Between these two ideas the legislators vacillated, finally compromising and fixing the rate of indemnity as follows: For temporary incapacity a daily payment of fifty *per cent.* of the daily wages. For permanent partial incapacity a pension of fifty *per cent.* of the annual loss of earnings. And for permanent total incapacity a pension of sixty-six and two-thirds *per cent.* of average annual earnings. In addition the employer to pay the cost of medical care. Noting that cases of permanent total incapacity are exceptional, it is manifest that the legislators intended to make the employer liable on the average for a little over one-half the loss. Whether the formula adopted successfully carries out that intention in practice is a question that will become relevant when we come to consider the abuses that have arisen under the compensation laws.

It should be noted that although the central feature of this law is the imputation of a contract to compensate for accidents not due to fault or wrong, nevertheless, to some extent the law sounds in tort, because it covers also and, in fixing the rate of indemnity, makes allowance for accidents attributable to faults. It is, therefore, not exact to say that the idea of responsibility for fault is entirely eliminated. It is true only that fault is no longer the criterion of liability.

The debates on the question of insurance followed lines with which we in America have recently become familiar. The prac-

⁹⁵ Sagot, pp. 103-4.

^{95a} Cf. *supra*, p. 838.

⁹⁶ Sagot, p. 124.

tical method of caring for industrial accident cases that, before the advent of the compensation law, best satisfied the popular conscience and the parties affected, was by the insurance of a moderate indemnity in every case, either in the form of collective insurance at the employer's sole expense, or of co-operative insurance in establishment funds. The then existing law interfered seriously with the operations and growth of such practices. Consequently there was an initial disposition on the part of the lawmakers to regard some such definite form of insurance as an essential feature to the desired reform and to establish it by the law. But that gave way gradually to the simpler juridical idea of remodelling the law to harmonize with the ideas of justice upon which those practices were based, leaving employers free to adapt their insurance methods to their own particular needs.

First monopolistic state-managed insurance was rejected. Then, compulsory insurance in employers' mutual associations. And, finally, compulsory insurance altogether. All parties interested demanded a direct liability. But the idea prevailed early that the workmen ought to have some guaranty of payment. The question, then, was how reasonably to assure the payment to the workmen, without unduly restricting the free initiative of employers or burdening industry. From the workmen's standpoint all that is to be feared is the employer's insolvency. To protect the workmen against that contingency it is sufficient to require insurance solely against the employer's insolvency, and not at all necessary to compel the employer to carry full insurance. Accordingly the final conclusion was to secure payments for temporary disabilities by a lien, and for permanent disabilities and fatal cases by a guarantee fund, to be maintained by a small tax upon all the employers subject to the law. And, to protect the employers against the possibility of a monopoly, a state-managed insurance fund was established to compete with private insurers.⁹⁷

There was some criticism of the guaranty, on the ground that it violated the principle of equality before the law and con-

⁹⁷ Maltet, pp. 37-105; Sagot, p. 116.

stituted of the workmen a privileged class.⁹⁸ It was excused on the grounds that its cost would be trifling and that the benefit to the workmen would be great. And, moreover, the principle of conferring small privileges upon the wage-earning class was already established in the law.

The British Law.

The first change in Great Britain in the branch of law under discussion, was the Employers' Liability Act of 1880, which entitled workmen to recover, in a limited amount, for injuries resulting from the negligent performance by superintendents, *etc.*, of the master's delegated duties and powers. It being found that employers were frequently "contracting out" of their liability, by agreement substituting therefor insurance in private co-operative schemes, bills were introduced in Parliament in 1881, 1882 and 1883 to prohibit it.⁹⁹ But the majority judgment being favorable to such schemes, the bills failed to pass.

In 1893 the Liberal Government introduced a bill to abolish the defence of common employment and to reduce the defence of assumption of risks. This bill elicited the criticism by Mr. Chamberlain that, "No amendment of the law relating to employers' liability will be final or satisfactory which does not provide compensation to workmen for all injuries in the ordinary course of their employment, and not caused by their own acts or defaults." A second bill was thereupon introduced by private members, to make employers liable for compensation for all injuries due to the employment, such compensation to be in the form of annuities, of amounts specified, to be purchased of the Post Office.¹⁰⁰ Both bills failed.

Other bills were introduced the following years, without success. Finally, on May 3, 1897, the Conservative Government brought in a bill, which, on August 6, became the Workmen's Compensation Act of 1897. In support of this bill it was argued that workmen ought to be in a better position towards their

⁹⁸ Maltet, pp. 79-80.

⁹⁹ Packer, p. 17.

¹⁰⁰ Packer, p. 19.

employers than strangers, and ought to be given a certain but limited compensation for all accidents. Its sponsors admitted that the principle of the bill was new, but based it upon the theory that, "When a person on his own responsibility and for his own profit sets in motion agencies which create risks for others, he ought to be civilly responsible for the consequences"¹⁰¹—a theory reaffirmed in the debates preceding the later Act of 1906.¹⁰² The wear and tear on the workmen, incidental to an industry, they argued, should be a charge on that industry, just as is the wear and tear on machinery.¹⁰³ A practical purpose of the bill, they declared, was to establish a simple and inexpensive method of settling doubtful questions.¹⁰⁴

To the objection that the bill would put a legal where no moral responsibility existed, Mr. Balfour replied that the law already did that by making a railroad responsible for an injury to a passenger, even where caused by the mistake of a good engineer.¹⁰⁵

To the objection that the bill was a plunge into socialism, Lord Salisbury replied that the existing law was socialistic and not the bill, since the former, through the Poor Law, placed a large portion of the loss on society, whereas the bill placed it upon the industry that caused it.¹⁰⁶

The indemnity was fixed at what was supposed to amount to one-half of the wage-loss on the ground that that was a "fair" measure.¹⁰⁷

There was some difficulty in reaching an agreement as to what to do in regard to accidents resulting from faults.¹⁰⁸ Finally those due to the "serious and wilful misconduct" of the injured workman were excluded altogether from the right to indemnity; and, on the other hand, the employer's liability at

¹⁰¹ Packer, p. 21.

¹⁰² Schwedtman & Emery, p. 9.

¹⁰³ Packer, p. 22.

¹⁰⁴ *Id.*, p. 21.

¹⁰⁵ *Id.*, p. 22.

¹⁰⁶ *Id.*, p. 22.

¹⁰⁷ *Id.*, p. 23.

¹⁰⁸ *Id.*, p. 29.

Common Law and under the Employers' Liability Act of 1880 was left unimpaired.

Under this law compensation is payable only for accidents "arising out of and in the course of the employment"; in other words, the accident must occur at a time when the relation of master and servant is really subsisting between the injured workman and his employer, and there must be a causal connection between the accident and a risk reasonably incidental to the work which it was the duty of that workman to perform—giving the word "duty," however, a wide and liberal interpretation.¹⁰⁹

The principle of this law is that "the pecuniary results from loss of life and injury incident to the carrying on of industrial enterprise" should be regarded as "a part of the expense of production"; the employer, who initiates it, should pay this expense in first instance, but "ultimately it will be paid by the community."¹¹⁰

The Act of 1897 applied only to the usual so-called dangerous industries. The principle of compensation has since been extended by the Act of 1900 to apply also to agriculture, and further extended by the Act of 1906 to apply to approximately all employments under "contract of service," but without change in the principles of the law, except an ill considered amendment^{110a} to allow compensation for serious injuries even though resulting from "serious and wilful misconduct." The earlier acts applied only to "injuries by accident"; but the Act of 1906 covers also specified professional diseases. No other compensation law has so broad a scope. In favor of this broad extension, "it was argued that all ordinary misadventures happening to workmen in the ordinary course of carrying on the work of the country should be regarded as incidental to the expense of carrying on such work, and ought to be a charge upon the particular industry, and that this should be so quite irrespective of whether or not the misadventure was caused by fault."¹¹¹

¹⁰⁹ Ruegg, p. 339; *cf.* Elliott, pp. 18-92.

¹¹⁰ Ruegg, *cit.* Packer, p. 23.

^{110a} Ruegg, p. 455.

¹¹¹ *Id.*, pp. 264-5.

The German Law.

The German workmen's compensation law is in the form of insurance, and this accident insurance is co-ordinated with other lines of insurance in a broad system of social insurance. Nothing like that system ever existed before. But the form given to the accident compensation law is rather a development of old established practices than an innovation. Throughout Germany numerous artisans' corporations and miners' brotherhoods, providing various types of mutual insurance to their members, have survived from earlier times, and in many instances have been favored and helped by the employers. In Bavaria, under the Law of 1869, in Baden, under the Law of 1870, and in Wurtemberg, under the Law of 1873, workmen were insured short sickness and disablement benefits by their communes, in return for small assessments upon their wages. In agriculture and in domestic and mercantile service the old feudal relations or their spirit, under which servants enjoyed some measure of protection from their masters, also survived. And the master's recognized duties were early confirmed by law. The National Code of Prussia of 1810 required the employer generally to provide maintenance and medical care during the disability of a domestic servant, and, if the disability arose out of the service, also to pay wages. And in commercial establishments employers were required to provide maintenance, care and wages for disabled employees for various periods, usually for six weeks.¹¹²

Consequently in numerous relations of employment the law of liability *ex delicto* merely supplemented these simpler rights and remedies, and was seldom used. But with the development of modern industries and the creation of a new class of laborers, among whom insurance was less general than among the older type of artisans, it became for many the sole recourse.

The Prussian Law of 1838 amended the law last mentioned as to accidents in the operation of railways, by reversing the burden of proof. The Imperial Law of 1871, extended the rule of this earlier Prussian law throughout Germany, and in addition

¹¹² Report, Commissioner of Labor, pp. 980-2; cf. also Dawson, Chap. I.

made the employer liable for accidents occurring in the operation of a mine, quarry, pit, or factory, due to the negligence of a "vice-principal."¹¹³

After several years' experience under the Law of 1871 it was generally recognized that conditions were not much improved. With the wide prevalence and satisfactory results of co-operative insurance, an extension and development of such insurance was naturally looked to as the most obvious means of relief.

Following the public discussion of plans proposed by private individuals and a comprehensive departmental investigation and report, the Imperial Government, after discussion by a special council of the Prussian Government, on March 8, 1881, brought forward its first bill for social insurance. Its main features were that employers operating mines, factories, *etc.*, were required to insure their workmen against economic loss from occupational accidents, the insurance to be carried by a government insurance institution, and the costs to be paid by the employer and the workmen, supplemented by a substantial subsidy from the state.¹¹⁴ This bill is supposed to have been dictated by Bismarck, and was defended by him as a measure purely of social relief. It was attacked from all directions, and upon various grounds. Among other criticisms it was objected that it was designed to bring about a condition whereunder a vast number of small pensioners would be dependent upon the government.¹¹⁵ Being amended to eliminate the federal subsidy and to substitute a system of state insurance offices in place of the federal office, the bill was dropped.

After another departmental inquiry, which produced instructive statistics of industrial accidents, and the Emperor's famous social insurance message of November 17, 1881, a revised bill for a system of compulsory accident insurance was brought in on May 8, 1882, along with a similar bill for compulsory insurance against sickness. The sickness insurance was to be paid for by the workmen, with liberal contributions from the employers, and was to cover disability from accidents for the first thirteen

¹¹³ Report, Commissioner of Labor, pp. 983-4.

¹¹⁴ Report, Commissioner of Labor, pp. 988-9.

¹¹⁵ Lichtenberger, p. 192.

weeks. The accident insurance was to cover disability from occupational accidents only after the first thirteen weeks, was to be paid for by the employers alone, except for a subsidy from the government, and was to be administered by mutual insurance associations organized along trade lines.¹¹⁶

The sickness insurance bill was taken up first, passed June 15, 1883, and came into operation December 1, 1884.¹¹⁷ The accident insurance bill had a different fate. There were serious objections to many details, and all parties opposed the government subsidy.¹¹⁸ Accordingly a new bill was brought in by the Government on March 6, 1884, which omitted the provision for a government subsidy, thereby placing the entire charge upon the employers. It was passed on July 6, 1884, and took effect October 1, 1885.¹¹⁹ This law applied only to workmen employed in mining, manufacture, *etc.* By subsequent laws its scope has been greatly extended and various of its features amended, but without material change in its principles.

The scale of the indemnity insured to the injured workmen, after the thirteenth week, is generally sixty-six and two-thirds *per cent.* of the loss of average earnings. Allowing for the part of such loss from accidents shifted onto the sickness insurance, the share thereof imposed upon employers is something less than fifty *per cent.* Wilful injuries are not covered by the law. Compensation is payable only where the accident occurs in the course of the employment and where there is a causal connection between the injury and a risk incidental to the particular occupation of the injured workman.¹²⁰

The principles of this law are thus stated by a high German authority:

"1. Proceeding from the assumption that he who creates an 'enterprise,' that peculiar structure of human beings, things and forces, and induces human beings to labor among arms of steel moving at uncanny speeds, establishes a source of danger

¹¹⁶ Report, Commissioner of Labor, p. 989.

¹¹⁷ *Id.*, p. 989.

¹¹⁸ *Id.*, p. 990.

¹¹⁹ *Id.*, pp. 990-1.

¹²⁰ Bulletin des Assurances Sociales, April, 1914, p. 26.

and becomes responsible for damage resulting from this source. Under this theory, *employers' fault* need not be proven. The fact that the injury has been caused establishes a right to compensation.

"2. Convinced that in many cases the resources of the individual employer would not prove equal to the enormously increased liability, and that therefore the existence of the employer as well as the compensation of the injured worker would be jeopardized, *individual responsibility* was eliminated, and in its stead was placed the *collective responsibility* of the industry.

"3. To carry out this idea large industries as well as agriculture, commerce and crafts, or small industries, were organized into employer's associations grouped according to callings. That is, legally incorporated self-governed bodies were formed, which every employer was *compelled by law* to join. . . . Upon these organizations was placed the responsibility of carrying and administering the accident compensation system; . . ."¹²¹

Another authority declares the principles of the law to be as follows:

"The Imperial legislation starts from this idea—that the undertaker of an enterprise, who employs workmen in order to appropriate to himself the economic value of the fruits of their labor, owes them not only the agreed wages for this labor, but ought also to bear with them the risks of accident resulting from this labor. This conception has not taken the shape of a principle of private law which governs the relations resulting, in a juridical sense, from the labor contract; it has become one of the tasks laid upon the state to take care of the victim of an industrial accident or of those he leaves behind him; and this task is accomplished with the means and according to the forms dictated by public law. The right of the workman to the solicitude of the state is therefore wholly independent of an agreement relating to his work and the clauses it contains; he enjoys this right even when there is no agreement of this sort and this convention can neither modify this right or deprive him of it. So, this right is not founded on a fault committed by the master or one of his employees, and even a fault of the workman does not affect it at all unless he has intentionally caused the accident. The obligation to aid the workman is not a legal obligation . . . of the master toward his workmen, for master and workman are not set against one another like debtor and creditor, and they are powerless to vary the right of one to aids

¹²¹ Neisser, cit. Schwedtmann & Emery, pp. 27-8.

and the obligation of the other to give them. The workmen or their survivors receive the aids which come to them by an intermediary that the Empire or the State has delegated to perform this duty, an intermediary who has with them no private legal relation, who simply performs a public administrative function, confided to him by imperial order, when he determines the indemnity to be given to the workmen or effects its payment."¹²²

The foregoing excerpts make it clear that the German accident insurance law is "public" and not "private" law, that it creates no relation of debtor and creditor between the employer and his injured employee, and that it is a fulfillment of "one of the tasks laid upon the state," by the political policy of state socialism. But when we go further and enquire why the state places the whole charge of this insurance upon the employer, measuring his premiums according to his risks, and limiting the application of the insurance to those accidents only resulting from risks incidental to his enterprise, the first excerpt answers distinctly that it is because the employer is deemed responsible for the trade risk, whereas the second simply says that it is because the employer "ought to" bear the risks of occupational accidents with his workmen. This difference in exposition reveals what appear to be two different schools of thought in Germany, the one emphasizing the juridical nature of the workman's right to compensation and of the employer's obligation to provide for it, and the other emphasizing the political policy of the insurance laws.¹²³ But it seems evident simply from the terms of the workmen's accident insurance law and from the historical events preceding its enactment, that in it the principle of trade risk has penetrated into a system of social insurance designed originally to rest solely upon the policy of state-socialism and has been made the basis of the employer's obligation to bear the entire charge for the insurance. This is the general opinion of foreign commentators.¹²⁴

In support of this conclusion it should be noted that although under this law "the employer's individual responsibility was elim-

¹²² Laband, "Droit Public de l'Empire Allemand", cit. Randolph, p. 60.

¹²³ Cf. Kaskel, Bulletin des Assurances Sociales, April, 1914, p. 25.

¹²⁴ Schwedtmann & Emery, p. 6; Sagot, p. 248; Sachet, p. 28.

inated" and replaced by the collective responsibility of his trade association, yet in turn he has been made liable to that association for premiums in proportion to his risks, and consequently his individual obligation remains equivalent to what it would be if his liability were direct to his employees, as under the compensation laws of France and Great Britain.

The Austrian Law.

The evolution of the compensation law in Austria started from social and industrial conditions very similar to those in Germany, and thereafter followed very similar lines. Fraternal organizations, providing mutual insurance against accidents and sickness, were common among artisans and journeymen, surviving from the days of the medieval guilds. Among miners particularly the insurance and the insurance organizations were best developed. By the Mining Code of 1854, insurance was made general among miners by compulsion and employers' contributions were exacted. By laws enacted in 1859 and 1867, attempts were made to foster the spread of voluntary mutual insurance in other industries, but without much success. Some progress was made through proprietors of large industrial organizations starting up private establishment funds for their workmen; but the practice grew slowly. Consequently public opinion tended towards compulsory insurance; and this tendency was accelerated by the strong influence of events in Germany.¹²⁵

In the early days of the factory system the Law of 1837 had placed on industrial proprietors an obligation to care for their injured and sick laborers for four weeks. In 1883 the Government introduced a bill to impose upon such employers a presumption of responsibility for accidents in their industries and to compel them to insure. This bill, however, failed. Finally, in 1886, the Government introduced a new bill, which became the Law of December 20, 1887.¹²⁶

This law applied only to industrial, agricultural and forestry enterprises (mining being covered by its own special code) using

¹²⁵ Report, Commissioner of Labor, pp. 413, 33-36.

¹²⁶ Report, Commissioner of Labor, p. 35; Sagot, p. 251.

mechanical motors, and only to those workmen exposed to the risks of the machinery. By later amendments its scope has been extended to include also transportation and certain miscellaneous occupations.

Under this law, insurance, in peculiarly organized territorial institutions, is compulsory. The employers bear the bulk of the charge for the insurance, but may deduct one-tenth thereof from the wages of such of their insured workmen as are paid over a specified low rate. The indemnity provided is sixty per cent. of the loss of average earnings, beginning at the end of the fourth week of disability, the workman in the meantime being cared for by sickness insurance. Allowing for the four weeks' waiting period and the ten per cent. contribution by the wage earners to the cost of the accident insurance, the charge placed upon the employer is less than fifty per cent. of the loss. Wilful injuries are not covered.¹²⁷ Otherwise compensation is payable for every accident, occurring during the course of the employment, between which and a risk of the employment there is a causal connection.¹²⁸ "It may, therefore, be said that the law adopts fully the doctrine of trade risk."¹²⁹

V. ECONOMIC AND SOCIOLOGICAL THEORIES.

So far attention has been concentrated upon the juridical bases of the compensation law. It remains to consider briefly how far it may also be based upon economic or sociological theories.

Economic Theories.

The New York Court of Appeals in 1911, referring to the compensation law, stated:

"It is based upon the proposition that the inherent risks of an employment should in justice be placed upon the shoulders of the employer, *who can protect himself against loss by insurance and by such an addition to the price of his wares as to cast the burden ultimately upon the consumer.*"¹³⁰

¹²⁷ Sagot, p. 252.

¹²⁸ Sachet, p. 177.

¹²⁹ Report, Commissioner of Labor, p. 38.

¹³⁰ *Ives v. South Buffalo R'y Co.*, 201 N. Y. 271, 294 (1911). (Italics mine.)

An American commentator says:

"A prominent argument for the compensation laws is that industry ought to bear a part of the loss inflicted upon workmen by accident instead of letting this press wholly upon them, and, in making the employer the paymaster, *it is assumed* that the expense will be passed on to the *consumers* as an item in the cost of production."¹⁸¹

The foregoing excerpts are quoted to present a proposition in economics which has often carelessly or ignorantly been advanced in support of the compensation law, but which does not underlie that law. When the measures for the compensation laws we are reviewing were under debate many of their advocates contended that the greater part of the indemnities would be paid by consumers;¹⁸² but even that qualified contention was vigorously contradicted and denied both in the French¹⁸³ and in the British¹⁸⁴ Parliament. And economists taught then, as they teach now, that the incidence of the charge will vary under different conditions, but that ultimately the greater part of it will probably come out of wages.¹⁸⁵ And, although in the parliamentary debates undue emphasis, for political reasons, was given to the possibility of the charge coming wholly out of prices instead of partially or wholly out of wages or profits, there appears to be no valid ground for the belief that the proponents of the compensation laws based them upon an economic assumption then generally recognized to be at least partially false.

What, then, is the economic doctrine of the compensation law? To make it clear the principles of trade risk will be restated in their economic aspects: As between the injured workmen, on the one hand, and the employer, his uninjured workmen and the consumers of his product, on the other hand, it is just that the latter should pay compensation to the former. The liability to pay that charge is placed in first instance upon the employer, not essentially as a punishment to be suffered by him

¹⁸¹ Randolph, p. 55. (*Italics mine.*)

¹⁸² *Cf.* Faure, cit. Sagot, p. 88.

¹⁸³ Sagot, p. 107.

¹⁸⁴ Report, Commissioner of Labor, p. 103.

¹⁸⁵ *Cf.* Packer, p. 79; Taussig, "Principles of Political Economy", pp. 324-6.

personally, but as a charge of production to be met by him as would be any other new or increased charge. This additional charge the employer may justly reckon among his other charges of production in fixing his prices; but *non constat* that under all conditions he can or should still pay his old wages and enjoy his old profits and unload this item of expense altogether upon his consumers. It is sufficient that the charge will be distributed according to the natural laws of economics among those in the community who profit by or enjoy the benefits of the industry, instead of falling upon the victims of the industry.

But the hostile critics of the doctrine of trade risk insist:

"Distribution of the compensation charge among *consumers* . . . is to this theory so essential a corollary that in France the charge is not imposable in domestic service, because this is non-productive, or imposed in such vocations as the liberal professions, where it cannot well be passed on."¹³⁶

This is strange doctrine. In the economic sense employers in domestic service are the consumers of the products of such service, and consequently there is there no question of passing on the charge; and the charge is not only "imposable" in domestic service, but in Great Britain it is actually imposed therein. And in the liberal professions the charge, if imposed, could be as readily passed on as in productive industry. There were undoubtedly other motives, besides those hereinbefore enumerated ^{136a} for limiting the scope of the compensation laws generally so as to exclude domestic service and the liberal professions; but no evidence has been found that an idea that in those employments the charge would fall on the wrong parties really determined that result.

The hostile critics further insist that:

"If a law proceeding on the theory that industry should bear the accident loss takes no account of the incidence of the burden it will lead to gross inequalities in respect of particular trades and particular establishments."¹³⁷

¹³⁶ 2 Randolph, pp. 33-4. (Italics mine.)

^{136a} *Supra*, pp. 846-47.

¹³⁷ Randolph, p. 56.

This criticism is not aimed at the temporary hardships that may result during the adjustment period after the first imposition of a compensation charge, nor at the possibility of an unfair handicap in competition with foreign industries not burdened with a like charge. Nor does it refer to the condition, vital to a fair operation of the compensation law, that there must be available insurance at rates scaled fairly in proportion to risks. What is objected to is that there may be particular enterprises and industries that cannot bear the charge. Such a condition may result where the accident cost of an enterprise is abnormal. If such cost be abnormal in relation to the product, because of extraordinarily hazardous machinery, methods, processes or conditions, the proprietor may be forced either to reduce his risks or to quit. And if the product itself be so dangerous that it cannot be manufactured and sold for a price sufficient to cover the charge the alternatives will be the same. Are such results unjust? The advocates of the compensation law answer this question in the negative, charging that such enterprises are "parasitic." Their argument in support of this charge has been well stated by the United States Supreme Court, as follows:¹³⁸

"It is just and reasonable that if a person uses a dangerous machine he should pay for the damage it occasions; if the reward which he gains for the use of the machine will not pay for the damage, it is mischievous to the public and ought to be suppressed, for the loss ought not to be borne by the community or the injured person. If the use of the machine is profitable the owner ought to pay compensation for the damage."

Sociological Theories.

Turning to the sociological theories, we are not concerned with the ancillary features and incidental methods of the various compensation laws, but solely with the central feature common to them all, namely, the employer's obligation to compensate for a portion of the economic loss from occupational accidents.

The first feature to be noticed is that under the French and British compensation laws the employer is deprived of full lib-

¹³⁸ *St. Louis & S. F. R'y Co. v. Mathews*, 165 U. S. 1, 9 (1897), citing *Powell v. Fall*, 5 Q. B. D. 597, 601 (1880).

erty of contract, in as much as he is not allowed to contract out of the liability imposed upon him. But similar restrictions upon liberty of contract, dictated by reasons of public policy, are common to all jurisprudences.¹³⁹

Next, under all the compensation laws reviewed, the workmen are given some form of security for the payment of the compensation. Under the British law it is a preference in bankruptcy; under the French law, it is either a lien or an insurance of the employer's solvency; and, under the German and Austrian laws, it is full and direct insurance. Every such provision for security constitutes a class privilege, and implies a recognition of a public interest in the welfare of the working-people.¹⁴⁰ But security for payment is ancillary and not essential to the primary obligation—that of the employer to provide compensation—and does not alter the nature of that primary obligation.

Equally non-essential is the fact that in Germany the compensation law is embodied in a highly bureaucratic system of accident insurance, which in turn is intimately correlated with other lines of insurance in a general system of social insurance based expressly upon the doctrines of "state-socialism." But the question remains whether the employer's obligation to provide compensation through that insurance has not itself another and a sociological basis besides the juridical idea of responsibility for trade risk. Referring to the previous chapter upon the development of the German law it will be recalled that it originated in a measure for workmen's insurance, to be maintained by taxes and assessments, and based altogether upon the policy of state-socialism. That policy prevailed in the laws subsequently enacted for sickness insurance, invalidity insurance, *etc.*; but it did not prevail entirely in the accident insurance. Into the successive measures for that last named branch of the insurance the juridical idea of trade risk made progressive inroads. State subsidies and employees' contributions were eliminated, the entire charge for occupational accidents being placed upon the employers, non-occupational accidents were excluded, and the rate of compensa-

¹³⁹ *E. g.*, Chicago, B. & Q. R. R. Co. v. McGuire, 219 U. S. 549 (1911).

¹⁴⁰ Ancy, p. 7.

tion was fixed according to the principles of the theory of trade risk, without relation to the rates of benefits provided for other misfortunes under the other insurances. Consequently the accident insurance law has been generally claimed as a victory for the idea of trade risk. Nevertheless the impress of state-socialism remains, and gives to the employer's obligation under this law something of a double basis.

What has just been said in large part applies also to the Austrian law, which has followed the principles of the German law.

There are those who contend that these accident compensation laws go beyond the limits of state-socialism in the direction of radical socialism, because the state makes no contribution and (except under the Austrian law) the entire burden is placed upon the employing class.¹⁴¹ From the historical standpoint, at least, this contention seems to be the reverse of the truth. For the burden has been so placed in accordance with the doctrine of trade risk, which is a juristic conception, identified with a school of thought absolutely opposed to radical socialism.

It is a more subtle question than any of the preceding whether the principle of trade risk itself is not based upon the ideas of a new school of justice called "social justice." Characteristic of that school is the proposition that a private obligation may be based upon a public duty, and yet be purely juridical and free from any element of charity.¹⁴² But the doctrine of trade risk is not altogether identified with that school. What appears to be the prevailing conception of its basis is indicated in the following words of Count de Mun:

"The agitation over work accidents arises from the sentiment, day by day more profound, of the duties and obligations which result, for both employers and employees, from the relations that are formed between them by the labor contract."¹⁴³

In other words, the obligation to pay compensation is based upon the idea of a duty owing from the employer to his injured

¹⁴¹ Cf. Randolph, pp. 59-60.

¹⁴² Saleilles, cit. Bouyer, note p. 116.

¹⁴³ Bouyer, p. 34.

workman and not of a duty owed by the employer to society to care for his workmen—although there may be also some such duty as the latter.

VI. OBJECTIONS TO THE COMPENSATION LAW.

In conclusion the principal objections to and criticisms of the compensation law will be noticed. It will be sufficient to outline briefly those relating to its principles and simply to indicate the answers. But, for the convenience of the reader, to whom the matters involved may be entirely unfamiliar, those relating to its practical results will be more fully treated.

1. Jurisprudence recognizes only two grounds for private legal obligations—contract and fault.

This objection to the principle of trade risk was vigorously urged in France.¹⁴⁴ But as there used the word "jurisprudence" means, not the science of law, but the settled law. If used in the former sense the objection would be refuted by the existence in the Roman Law of an open line of private obligations *quasi ex contractu*.¹⁴⁵

The objection as raised in the United States is similarly qualified. Here it is contended that jurisprudence became fixed by the adoption of the Bill of Rights in our constitutions in a form that recognizes only contract or tort as a basis of liability.¹⁴⁶ No support for the doctrine proclaimed in this objection can be found in the Common Law, the spirit of which has always been peculiarly progressive and open to new principles.¹⁴⁷ It is not appropriate here to enter into the much mooted question of constitutionality. But to connect the matter of these pages with that question, it is submitted that if the principle of trade risk, however novel and unknown at the time of the adoption of our constitutions, be soundly juridical, it is "due process of law" to base a private obligation thereon.

¹⁴⁴ Leon Say, Yves Guyot, and others, cit. Sagot, p. 55.

¹⁴⁵ Cf. "Howe's Studies in Civil Law", 2d ed., pp. 269-270.

¹⁴⁶ Ives v. South Buffalo Ry. Co., 201 N. Y. 271, 293 (1911); *contra*, but perhaps *obiter*, Chicago Ry. Co. v. Zerneck, 183 U. S. 582, 586 (1902); *State ex rel. Davis-Smith v. Clausen*, 65 Wash. 156 (1911); *Borgnis v. Falk*, 147 Wisc. 327 (1911).

¹⁴⁷ *Hurtado v. California*, 110 U. S. 516, 530-1 (1894).

2. "If the legislature can say to an employer, 'you must compensate your employee for an injury *not caused by you* or by your fault,' why can it not go further and say to the man of wealth, 'you have more property than you need and your neighbor is so poor that he can barely exist; in the interest of natural justice you must divide with your neighbor,'? . . ."¹⁴⁸

The words italicized flagrantly beg the question by misrepresenting the law criticised. Under the compensation law there is no liability unless there is a causal connection between the accident and a risk reasonably incidental to the injured workman's employment. And, as we have seen, that law is based upon a theory of employer's responsibility for the causation of that risk. This theory of causation may be disputed, but its existence at the basis of the law may not be ignored.

An American commentator on social insurance also falls into this error, contending that all question of responsibility for causation is eliminated under the compensation law. He supports this contention by the assertion that under the laws of France, Germany and Austria compensation is payable for "all accidental injuries occurring during the time of the employment."¹⁴⁹ How absolutely incorrect this assertion is has already been shown.^{149a} Nevertheless it is worth while for emphasis, to repeat the rule on this point, as correctly laid down by another American commentator: The theory of the compensation law is "that an industry should stand the cost of its own operation. It makes no difference, according to this theory, whether the cost is due to an injury to a workman or to the breaking or wearing out of a machine. . . . Further than this, however, no theory can be justified which puts a liability upon an industry. A theory justifying the imposition of a liability on an industry because the injury is caused by that industry impliedly excludes liability for all other injuries."¹⁵⁰

¹⁴⁸ *Ives v. South Buffalo Ry. Co.*, 201 N. Y. 271, 295 (1911). (Italics mine.) The inconsistency between this criticism and the fourth (*infra*, p. 48) should be noted.

¹⁴⁹ Rubinow, pp. 103, 110.

^{149a} *Supra*, pp. 848-49, 854, 857, 861.

¹⁵⁰ C. P. Berry, "Central Law Journal", January 23, 1914.

3. The obligation imposed upon employers by the compensation law is such that it would expose the majority of them to a constant peril of financial ruin, regardless of any degree of care on their part, unless that peril be avoided by insurance. Consequently the law presumes insurance. Therefore what the law establishes is essentially a political system of distributing an economic loss, and the obligation it imposes upon employers is *per se* not just.

The premises of this criticism are true. The compensation law does presume insurance for its proper operation. "If it has the trade risk for its point of departure, the . . . law has also as point of arrival the realization of insurance."¹⁵¹ Insurance totalizes the losses, distributes them among a number of persons and throughout a number of years, and thus renders them more regular and less disturbing. More scientifically stated, insurance, if correctly administered, converts the liability into a fixed charge fairly proportionate to the risk.¹⁵² It is, therefore, not only desirable in order to secure the workmen, but also necessary for the proper distribution of the charge.

But from these premises does the conclusion of the criticism follow? Is a legal obligation unjust because, for its proper operation, it requires of those upon whom it is imposed an ordinary and usual business precaution? Does applied law deal with abstractions or with realities?

This criticism comes with peculiarly bad grace from the advocates of the old system of liability, since that system also exposed employers to an almost equal peril of financial ruin practically—although not theoretically—regardless of any degree of care on their part, unless they protected themselves by insurance. In fact the situation of the industrial employer is identical under both laws, except as to the cost of the charge for insurance.

Nevertheless there are many believers in the principle of trade risk who accept the conclusion of this criticism. They argue that the state cannot stop short with the imposition of the obligation; it must go further and provide the insurance. The thesis of

¹⁵¹ Paulet, cit. Ancey, p. 6.

¹⁵² Cf. Ancey, p. 38.

the German accident insurance system is that "it is necessary to provide the employers with the assurance of absolute security, which can only be done by institutions having the guarantee of the Government; in addition it must provide the cheapest kind of insurance possible, which can only be done by eliminating the element of profit."¹⁵³ This, however, is jumping to most doubtful conclusions. Is governmentally provided insurance, in one rigid form, even with a state guarantee and with profits eliminated, the most desirable? Or, on the other hand, can employers provide insurance for themselves better than politicians can do it for them? State socialists insist upon the former view; whereas all who believe in private initiative insist upon the latter. Those who hold the latter view contend that all that the state need do in this connection is to supervise and regulate compensation insurance as other insurance is supervised and regulated, and to protect employers from the possibility of a monopoly.

4. An object of the compensation laws was to reduce litigation. But "the theory of trade risk multiplies litigation instead of avoiding it." "In order to determine a causal connection between the accident and a risk of employment it is necessary generally to undertake a minute examination of the facts. Thus, by the application of its principle, this law leads back to the endless disputes over pure questions of fact that characterized the old law."¹⁵⁴

This criticism hits the German law, under which the burden of litigation for employers appears to have become heavier than ever.¹⁵⁵ The statistics of that litigation are truly appalling. In 1912 there were 421,855 awards by the accident insurance associations, open to litigation. From these awards there were 70,023 appeals to the arbitration tribunals. And from the decisions of those tribunals there were 22,827 appeals to the higher insurance offices.¹⁵⁶ This abnormal quantity of litigation, however, is not attributable to the substantive provisions of the law, but to its

¹⁵³ Report, Commissioner of Labor, p. 988.

¹⁵⁴ Morin, p. 89.

¹⁵⁵ Cf. Serre, p. 397.

¹⁵⁶ Villard, p. 34.

administrative features, and particularly to the fact that from political motives appeals have been made free to the workmen and encouraged. Moreover, only an infinitesimal proportion of this litigation turns upon the question of causal connection between the accident and a risk of the employment. The principal subjects of dispute are the existence of disability, the degree of the disability, the connection between the disability and the accident, and the amount of the compensation—subjects that would give rise to an equal proportion of disputes under any criterion of liability.

British experience, on the other hand, demonstrates that a compensation law may reduce litigation to a minimum. In 1912, the British law applied to about sixteen millions of working-people. There were 417,694 cases of compensation, of which 384,798 were new cases. There was litigation in only 11,042 cases. Of these litigated cases, 3016 were settled out of court or withdrawn, 1639 were applications dealing with allowances already granted, 459 were applications for apportionment of agreed compensation among dependents, and 46 were old cases under the Act of 1897, unclassified, leaving only 5858 as the number of new cases between employer and employee settled by the courts. Consequently there was litigation in only about one and one-half *per cent.* of the new cases. As to "industrial" accidents the proportion was still lower, being twenty-eight *per cent.* of the fatal cases and four-tenths of one *per cent.* of the non-fatal cases.¹⁵⁷ Moreover, litigation under this law is much less burdensome, expensive and prolonged than under the old liability law. In the courts of first instance trials are prompt and informal, the more complex issues of fact being determined out of court by medical referees, and the costs are regulated to bear very lightly upon the workmen. Appeals, however, are not much privileged and consequently are avoided. In 1912 only 212 cases were appealed to the intermediate courts of appeal, and only six cases were carried to the final court of appeal, the House of Lords. The principal issues involved in the litigation

¹⁵⁷ An intensive study of the fatal cases leads to the conclusion that a high ratio of litigation therein is humanly speaking unavoidable for many reasons.

are the same as in Germany. It is true that a large proportion of the reported cases turn on the question whether the accident "arose out of and in the course of the employment." But the reported cases are the appealed cases only; and that question, although so prominent in the appealed cases, is not the issue in any large proportion of the litigated cases and appears not to be a cause of dispute in much more than one or two claims out of a thousand.

5. In industrial life it is vital that the law should develop a sense of personal responsibility.¹⁵⁸ But in this respect the compensation laws have failed, as is evidenced by a large and constantly progressive increase in the industrial accident rate under their operations.

"The theory of trade risk has an immoral side in presenting accidents as the inevitable consequences of business." "It exaggerates the fatalism of accidents, the tendency to take them for granted too readily, to think that there is nothing to do but to pay the compensation or the insurance premium."¹⁵⁹

"The theory of risk, while admissible under certain conditions, has perhaps been exaggerated. A reaction has commenced. We are beginning to take into account that the danger of this doctrine is not only in predicating the right to reparation upon a too exclusive preoccupation with social utility, but this utility itself is not always accurately estimated. In diminishing forethought and the care for responsibility, is there not a sacrifice of the interests we are pretending to protect?"¹⁶⁰

"There is no doubt but that accidents are rendered more frequent by relieving from responsibility those whose imprudences give rise to them."¹⁶¹

Studying this line of criticism we must distinguish carefully between the consequences of the application of the principles of trade risk and the consequences of not applying them.

In the first place: It cannot rationally be claimed that the theory of trade risk tends to eliminate the idea of responsibility

¹⁵⁸ Bouyer, p. 163.

¹⁵⁹ Hauriou, cit. 2 Randolph, p. 35.

¹⁶⁰ Charmont, cit. 2 Randolph, p. 36.

¹⁶¹ Colson, "Organisme Economique et Desordre Social", pp. 153-4.

for risks, because it has itself, as it were, invented the idea of responsibility for the largest class of risks, the usual and ordinary risks of a business, for which, according to the theory of law it supplanted, nobody was responsible. And the charge that the application of this theory has tended to produce a sense of the inevitableness of the great mass of accidents, a sense that the risks of industry cannot be reduced, is disproved by the generally admitted fact that the very first and most immediate result of the compensation laws has been to cause industrial employers most materially to reduce the physical hazards of their enterprises. The fault, therefore, if any, does not lie in the basic theory of the compensation laws, but must be found in some one or more of their practical features.

The feature of those laws which first presents itself as a possible subject for this criticism, is their extension, for purely practical reasons, to cover accidents not due to the trade risk but to personal faults. In this respect it is an open question whether some or all of those laws have not gone too far.¹⁶² But as regards the prevention of accidents the weight of opinion of industrial experts seems to be decidedly in favor of such extensions, provided that compensation be allowed only for accidents occurring to workmen while acting within the scope of their respective employments, as is the rule under the laws we have reviewed. Even admitting the worst for this practice, it may be a wise choice between two evils; because the old law produced a condition, either of employers' general irresponsibility or of chaotic uncertainty as to responsibility, which, as regards accident prevention, was infinitely the worse. Moreover, it is argued that the division of the economic loss from each and every accident must in some degree tend to produce among employers and employees a sense of joint responsibility for accidents as well as a joint interest in their prevention. And the validity of this argument is not impaired by the fact that the accident rate is increasing, for the reason that the defective formulas adopted in the laws for defining the rate of compensation do not divide the loss for every accident, but in a high proportion of accident cases give

¹⁶² Schwedtmann & Emery, p. 29.

the workmen approximately full indemnity, and in a smaller but yet material proportion give them a profit.¹⁶³ If then among the working-people there is to be noted an increasing sense of irresponsibility, it may be fairly argued that it is attributable to this failure to apply the principles of trade risk rather than to their application.

Some commentators assert that the principles of the accident compensation and insurance laws eliminate all idea of responsibility for causation,¹⁶⁴ and, if followed to their logical conclusion, "must entirely do away with any vestige of the old principles of fault";¹⁶⁵ and that the rate of compensation is based upon "needs"—i. e., the needs of the injured workman and his family—and not upon "loss."¹⁶⁶ And they emphasize the inevitableness of accidents.¹⁶⁷ Such commentators, however, are not exponents of the principles of trade risk, which theory they repudiate,¹⁶⁸ but of the doctrines of democratic socialism; and their views of these laws are palpably heterodox.

In the second place: Although statistics show an alarming increase in the accident rate under the compensation laws,¹⁶⁹ yet it is a mistake to jump to general conclusions therefrom. For an analysis of the detailed figures brings out the facts that the rate of accidents ascribed to employers' faults is decreasing, and that the rate of major accidents—of fatal and serious cases—has remained fairly constant, which is an improvement over previous conditions. Consequently the increase is solely in the rate of minor injuries, and, if it be attributable to indifference at all, such increased indifference is solely on the part of the workmen.

Moreover the increase indicated in the accident rate has been

¹⁶³ Cf. Ruegg, p. 537.

¹⁶⁴ Rubinow, p. 104.

¹⁶⁵ *Id.*, p. 133.

¹⁶⁶ *Id.*, pp. 124, 133.

¹⁶⁷ *Id.*, pp. 82-83.

¹⁶⁸ *Id.*, p. 115.

¹⁶⁹ In Germany from 30.28, per 1000 workmen covered, in 1890 to 52.83 in 1911; in France from 63.4 in 1901 to 87.2 in 1910; in Great Britain from 45.5 in 1909 to 57.5 in 1913; and in Austria from 10.25 in 1891 to 16.99 in 1911. The figures for the different countries are computed upon different bases and are not mutually comparable.

more apparent than real. In the first years under the operations of the compensation laws it was principally attributable to improvement in the reporting of accidents, and of later years it has been attributable principally to an increasing disposition to claim disability by accident without any real increase in injuries. Consequently the real increase in the rate of injuries by accident is very much less than the statistics indicate. And some of that increase is probably due to the increasing speed of machines and machinery, and to a lowering of the working-class level of ability brought about by a higher proportion of women and foreigners in industry. Consequently, in final analysis, it appears certain that the increase in the accident rate attributable to indifference or a sense of the inevitableness of accidents, is much less, of less serious consequence, and more specialized, than would naturally be inferred from the statistical summaries.¹⁷⁰

Nevertheless it must be admitted that the various abuses that have arisen under the compensation laws are slowly sapping the sense of responsibility on the part of the working-people, and that the criticism under consideration has the merit of calling attention to the dangerous aptitude of these laws to perversion and abuse.

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¹⁷⁰ The writer believes that a properly framed compensation law is an efficient regulation for accident prevention. But space forbids any consideration of that aspect of the subject.